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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120313185-3252-01]

RIN 0648-BC01

Fisheries off West Coast States; Pacific Coast Groundfish Fishery; Trawl Rationalization Program; Reconsideration of Allocation of Whiting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This action revises several portions of the Pacific Coast Groundfish Fishery Trawl Rationalization Program (program) regulations in response to a court order requiring the National Marine Fisheries Service (NMFS) to reconsider the initial allocation of Pacific whiting (whiting) to the shorebased individual fishing quota (IFQ) fishery and the at-sea mothership fishery. Additionally, NMFS concludes after review of public comments and the record as a whole, that the Pacific Fishery Management Council's (Council's) recommendation to maintain the existing initial allocations of whiting is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Pacific Coast Groundfish Fishery Management Plan (Groundfish FMP), and other applicable law. This final rule will affect the transfer of quota share (QS) and individual bycatch quota (IBQ) between QS accounts in the shorebased IFQ fishery, and severability of catch history assignments (CHAs) in the mothership fishery, both of which will be allowed on specified dates, with the exception of widow rockfish. Widow rockfish

is no longer an overfished species and transfer of QS for this species will be reinstated pending reconsideration of the allocation of widow rockfish QS in a future action. The divestiture period for widow rockfish QS in the IFQ fishery will also be delayed indefinitely.

DATES: This rule is effective April 1, 2013.

ADDRESSES: Information relevant to this final rule, which includes a final environmental assessment (EA), and a final regulatory flexibility analysis (FRFA), including a regulatory impact review (RIR), are available from William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070. Electronic copies of this final rule are also available at the NMFS Northwest Region Web site:

<http://www.nwr.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Ariel Jacobs, 206-526-4491; (fax) 206-526-6736; Ariel.Jacobs@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

This final rule revises several provisions of the Pacific coast trawl rationalization program and supersedes regulatory delays and/or revisions NMFS established through temporary emergency action in a final rule published on August 1, 2012 (77 FR 45508), and extended on January 17, 2013 (78 FR 3848). Specifically, this action will:

- (1) Allow transfer of QS or IBQ (except for widow rockfish QS) between QS permit holders in the shorebased IFQ fishery beginning January 1, 2014;
- (2) Require QS permit holders in the shorebased IFQ fishery holding QS or IBQ in excess of the accumulation limits to divest themselves of excess QS (except for widow rockfish QS) or IBQ by November 30, 2015;

(3) Allow limited entry trawl permit holders in the mothership fishery to request a change (or transfer) of mothership/catcher vessel (MS/CV) endorsement and its CHA beginning September 1, 2014;

(4) Require MS/CV endorsed limited entry trawl permit owners to divest themselves of ownership in permits in excess of the accumulation limits by August 31, 2016; and

(5) Extend the divestiture period delay and moratorium on transfer of widow rockfish QS in the shorebased IFQ fishery indefinitely.

Each of these elements, along with additional background information, were described in detail in the proposed rule (78 FR 72, January 2, 2013), and are not repeated here.

NMFS Decision on Reconsideration of the Initial Allocation of Whiting

NMFS has determined that the Council's recommendation to maintain the existing initial whiting allocations (No Action Alternative) is consistent with the MSA, the Groundfish FMP, the court's order in Pacific Dawn v. Bryson, No. C10-4829 TEH (N.D. Cal.) (Pacific Dawn), and other applicable law. This determination is based on NMFS' review of the entire record, including the Council's record and NMFS' consideration of comments received on the proposed rule. After considering the required statutory factors and the goals and objectives of the trawl rationalization program and the Groundfish FMP, NMFS has determined that the existing initial whiting allocations provide for a fair and equitable allocation to the shorebased IFQ program and the mothership coop program. These initial allocations of whiting take the form of QS for both harvesters and processors in the shorebased IFQ program, and CHA for harvesters in the mothership fishery. For the purposes of this action, "quota" is used to describe allocations of both CHA and QS to harvesters in the shorebased IFQ and mothership fisheries, as well as to describe allocation of QS to shoreside processors.

In the context of the relatively narrow remand ordered by the court in Pacific Dawn, NMFS has determined that many MSA factors show minimal differences, or none at all, between the alternatives under consideration. Additionally, where there are differences, they are tempered by the relatively modest shifts in quota among the various alternatives and other relatively minor variations that result. For example, comparing the No Action Alternative to the alternative most favoring recent history (Alternative 4) reveals overall modest shifts in quota from status quo holders to others (17% for shorebased harvesters, 3% for shoreside processors, and 18% for mothership harvesters) and generally modest shifts among most individual permit holders and processors. This is principally the result of the fact that a majority of participants in the whiting fishery have generally continuous participation in the fishery. Given this, and in balancing the various factors in this decision (including control date, investment and dependence, disruption, efficiency, employment, current and historic participation, communities), NMFS has concluded there are fundamental and compelling reasons to maintain the existing initial allocations of whiting. Of most importance, maintaining existing allocations takes into account the intent of the 2003 control date and principal policy goals of the trawl rationalization program (including reducing overcapitalization and ending the race for fish). Maintaining status quo also reduces concentration of quota among participants and achieves a wider geographic distribution of initial program benefits. NMFS believes these key factors, among other considerations, outweigh the reasons supporting alternatives that favor more recent history (e.g., recognizing recent fishery participants' dependence and investments, reducing future quota leasing or acquisition costs, reducing quota to recent non-participants, and reflecting more recent market and fishery conditions). More detailed discussion on the specific statutory factors under MSA

section 1853a(c)(5)(A) and related provisions is set forth in the preamble to the proposed rule and not repeated here.

Maintaining the initial whiting allocations, including the use of qualifying years of 1994-2003 for whiting harvesters and 1998-2004 for whiting processors, supports the Council's and NMFS' efforts to reduce overcapitalization and end the race for fish by not rewarding increases in harvesting or processing that occurred after the end of the qualifying periods (i.e., after the 2003 control date). The existing whiting allocations also support the importance of the control date for this and future rationalization programs, minimize the concentration of harvester quota, and provide for a wider initial geographic distribution of the program benefits along the coast and the corresponding fishing communities.

Importance of the Control Date

Two fundamental purposes of Amendment 20 were to reduce overcapitalization in the groundfish fishery and to end the race for fish. The Council adopted and announced the 2003 control date to further these purposes, seeking to discourage speculative capitalization and discourage effort by putting participants on notice that any fishing history earned beyond 2003 may not count towards a future allocation system. Since the original notice of the 2003 control date in the Federal Register on January 9, 2004 (69 FR 1563), there has been continuous and systematic work to develop the trawl rationalization program. Throughout the reconsideration, many participants testified or provided written comment with respect to how the announcement of the control date affected their business decisions. NMFS acknowledges that a control date is not a guarantee that any specific period will count toward initial allocations. NMFS believes, however, that recognition of the business and investment decisions made by participants who interpreted the control date as signaling the likely end of the qualifying period is consistent with

the fundamental purposes of Amendment 20. While no mechanism exists to separate speculative from non-speculative effort after the control date, maintaining the control date for harvesters does not reward any speculative behavior after the control date and does not penalize those who honored the control date. Additionally, an important signal is sent for future programs (nationally as well as on the Pacific Coast)—the use of control dates is still a valid tool to deter increases in effort or capitalization that would undermine conservation and management goals pending development of a limited access privilege program.

Moreover, for processors, the record establishes valid reasons to end the qualifying period for processors one year after the 2003 control date, including accounting for processor investments that took place prior to the announcement of the control date but that did not begin to earn processing history until 2003 and 2004. In addition, the purpose of applying control dates to onshore processors, while important, is not necessarily as significant as for harvesters, who have a greater ability to move into and out of various fisheries to gain potential fishing history. These factors, in addition to the fact that it was not clear until 2005 that the 2003 control date potentially applied to processors, support the decision that a one year shift, to 2004, was a reasonable cutoff date for processors.

While maintaining the end of the qualifying periods necessarily excludes providing credit for more recent participation, publication of the control date and the continuous and active deliberation of the Council provided notice to all participants that this was a possibility. Thus, those participants who did increase their investments or effort in the fishery were on notice that any history established in later years might not count towards initial allocations. Additionally, participants had the opportunity to purchase permits from others to bolster their catch history totals to potentially reflect their increased investments and effort (as the record reflects did

occur). The fairness of maintaining the initial cut-off dates also is reflected in the public comments of participants that supported No Action Alternative despite the fact that they would receive higher levels of quota if an alternative favoring more recent history were adopted.

Although the length of time between the original control date and the agency approval in 2010, implementation of the program in 2011, and this decision in 2013 is longer than the time span in most programs that announce control dates, this is explained by the complexity of the program, which resulted in significant time needed to involve the public and fishery participants, develop alternatives, develop appropriate analytical documents, reach a final decision, implement that decision, and then engage in this reconsideration process. Additionally, the Council and NMFS have fully considered all applicable fishing and processing history for this decision, leaving no gap in the available information considered.

Minimize Concentration of Quota

The record reflects that basing initial whiting allocations on alternatives that include more recent history would generally have the effect of concentrating quota for harvesters in fewer hands, creating fewer winners and more losers compared to maintaining the existing allocations (see EA, Section 4.5.3.2 and FRFA). Moreover, when viewed in the context of the trawl rationalization program as a whole, moving the end date of the qualifying period to a more recent year could have the effect of creating “double-dip” gains and losses for certain participants due to having different allocation periods for whiting compared to some non-whiting species. For example, there were seven permits that, after 2003, reduced their share of harvest in the non-whiting fishery while increasing their share in the whiting fishery (see EA, Section 2.2.3.2). Using an allocation period other than the No Action Alternative would benefit those participants with more whiting history in recent years because they would receive an amount of non-whiting

quota allocated under a 2003 cut-off while simultaneously receiving increased whiting quota (i.e., double-dipping) if a later end year was used for whiting allocations, creating inequities in the allocation of target species.

Wider Geographic Distribution of the Initial Benefits of the Program

The record reflects that maintaining the existing allocations would provide a more even distribution of initial whiting allocations along the coast and to the corresponding fishing communities. Shifting to alternatives favoring more recent history could contribute to a northward shift in initial quota distribution, and accordingly a similar shift in any benefits stemming from that initial allocation (see EA, Section 4.3.3). The northward shift is expected to be relatively small (less than 8 percent of the total quota—2 percent for processors and 6 percent for harvesters between the No Action Alternative and Alternative 4), and the analysis shows whiting landings have been shifting northward in recent years (due to fish availability and investments in ports). Although the 8 percent difference is relatively modest, NMFS believes that maintaining the initial whiting allocations supports historic fishing communities in more southern locations and creates a wider geographic distribution of the initial benefits associated with allocations. Maintaining initial whiting allocations would further support one of the guiding principles in the development of Amendment 20 (see Am 20 EIS, Section 1.2.3)—to minimize negative impacts resulting from localized concentrations of fishing [and processing] effort. For processors, in addition to the distribution of wealth associated with initial allocations, the wider distribution of initial allocation of whiting QS may provide some additional influence over where deliveries are made along the coast than if the initial allocation were based on more recent qualifying years that would shift allocations and potentially landings northward.

Comments and Responses

In the proposed rule, NMFS solicited public comments on the regulatory revisions and on NMFS' preliminary determination that the Council's recommendation to maintain the initial allocations of whiting for the shorebased IFQ fishery and the at-sea mothership fishery is consistent with the MSA, the Groundfish FMP, and other applicable law. The comment period ended February 1, 2013. NMFS received 19 written comments on the proposed rule reflecting comments from individuals, organizations and other agencies. NMFS also received oral comments regarding the existing initial whiting allocations at a meeting during the comment period. The U.S. Department of the Interior submitted a letter indicating that it had no comment. One written comment also addressed the proposed regulatory revisions. The comments received and NMFS' responses are below.

Process

Comment 1: NMFS has the responsibility of reviewing the record as a whole and ensuring that the action is consistent with the Groundfish FMP and the MSA. NMFS must not simply defer to the Council.

Response: NMFS agrees that it must make the final decision and cannot simply defer to the Council with respect to whether the recommendation to maintain the existing initial whiting allocations and make associated regulatory revisions is consistent with the Groundfish FMP, the MSA, including the national standards, and other applicable law. NMFS has taken its own hard look at the entire record, including public comment on the proposed rule, and determined that this action satisfies those requirements.

Comment 2: The public reconsideration process was thorough, lengthy, open, and transparent. To make appropriate decisions, Council members need stakeholder involvement and the Council reviewed and heard numerous public comments and advisory body statements

from various perspectives. In addition, the majority of Council members that participated in the reconsideration were not members of the Council when it took its original action in 2008, which allowed for thorough review of the fairness and equity of that decision.

Response: NMFS agrees that stakeholder involvement is the foundation of an open public Council process and is an important component of decision making, especially with respect to allocations. The Council, including NMFS representatives, reviewed and considered many comments from various perspectives at Council meetings and NMFS has further considered stakeholder input through the comments received on the proposed rule.

Comment 3: It is unclear what role the NOAA Catch Share Policy played in the reconsideration of initial whiting allocations. Further, based on the section of the NOAA Catch Share Policy entitled “evaluating catch share applicability,” three of the characteristics for use in determining whether a fishery is a suitable candidate for a catch share program—overcapitalization, overfished stocks, and bycatch—do not appear to be present in the whiting fishery in 2010 and therefore it is unclear whether the whiting fishery was a good candidate for a catch share program.

Response: NMFS considered the NOAA Catch Share Policy (the Policy) as part of the reconsideration. Generally, the Policy recommends that allocations be revisited on a regular basis and that an allocation decision should include consideration of conservation, economic, and social criteria in furtherance of the goals of the underlying FMP. The reconsideration of initial whiting allocations reflected consideration of the factors identified in the Policy. The decision to include whiting in the trawl rationalization program was approved in Amendment 20 and implemented in 2011. NMFS also considered provisions of the Policy at that time. Amendment 20 was developed to address among other things, overcapitalization, overfishing, and bycatch,

including bycatch of overfished species, in the groundfish trawl fishery (75 FR 78344). The decision to include the whiting fisheries as part of the trawl rationalization program is not part of the reconsideration of initial whiting allocations or this rule.

Comment 4: Consideration of a factor means that it must be weighed and taken into account, not noted and ignored. NMFS must provide a reasoned analysis that connects the factor with the decision it makes with respect to initial whiting allocations.

Response: NMFS agrees that consideration of a factor entails more than noting its existence. However, when making an allocation decision, the factors that must be considered do not require any particular outcome. For example, the requirement to consider current harvests when establishing a fair and equitable initial allocation does not mandate that the qualifying periods for initial whiting allocations be expanded to include years beyond the existing cut-offs. As the record demonstrates, there is a rational basis for excluding more recent years from the qualifying periods. The existing initial allocations further the goals and objectives of Amendment 20 and avoid rewarding increases in harvesting or processing at a time when the fishery was overcapitalized, and a time after participants were aware that history beyond 2003 may not qualify for use in an allocation formula.

Current and Historical Harvests

Comment 5: More recent years should be used in the qualifying period for allocating whiting to processors to reflect changes in the marketplace. The whiting market has changed since the end of the existing qualifying periods, specifically with the growth of the market for the whiting headed and gutted product. The changes made the fishery more efficient and economically stable after 2004, so more recent years should be more heavily weighted to establish a fair and equitable allocation.

Response: NMFS agrees that there have been changes in the markets for whiting. These changes have led to changes in the amounts and types of product made out of whiting. Since the early 1990s, shorebased processors have converted whiting into headed and gutted (H&G), surimi, fillets, and fish meal products. In the early 1990s, there was a much greater emphasis on surimi. New plants came on line in response to the demand for surimi caused by the phase out of Japanese and Korean fleets off the U.S. and Russian waters. In recent years there has been a much greater emphasis on H&G products, sparked by the increased world demand for H&G products. In the early 1990s, the market for H&G products was a limited domestic market and now the H&G market is international.

The surimi market has declined, based on changes in the Japanese and Korean demand and from foreign competition. As a result, surimi plants have either shut down or reduced production. Prior to 2004, up to five plants were producing surimi. Currently, there is only one shorebased plant that is producing whiting surimi and that plant is also producing H&G products.

In response to changing world markets, company restructuring, and other factors, there has always been entry and exit within the whiting processing sector. There have also been changes in relative prices of products that in turn determine the mix of various products. Underlying both the development of the surimi processing capacity, and now H&G processing capacity, have been declining trends in world groundfish production.

Overall, the major companies of the processing industry that existed prior to 2004 still exist in 2012. For companies that no longer exist, the quota that would have been allocated to those entities has been distributed to existing companies in proportion to the size of their quota allocations under the existing initial allocations. NMFS recognizes the influence of H&G prices and the new world markets, but does not believe these changes should result in selecting an

alternative that includes more recent years in the whiting allocation formula, as all companies are partaking in the expanded market for H&G whiting and can continue to do so irrespective of the amount of the whiting QS received by that entity. Furthermore, recent entrants into the processing sector entered at a time when they could benefit from the expanded market for H&G whiting, which could allow them to be competitive despite receiving no, or a lesser amount, of an initial whiting allocation. They also entered at a time after the control date had been announced and while the Council was actively pursuing development of the trawl rationalization program. NMFS believes that it is fair and equitable to use qualifying years that more heavily reflect the investments and processing history that occurred prior to 2004, consistent with the intent of discouraging speculative increases in capacity and minimizing disruption to processors that invested under the old management regime prior to the Council beginning its efforts to rationalize the fishery.

Comment 6: Using more recent years in the qualifying period promotes conservation because larger fish tend to occur in northern waters, and northern processors have a better opportunity to process larger and higher quality fish. Under alternatives that would shift more quota to the north, fewer larger fish can be harvested, leaving more fish in the water to spawn and sustain the fishery. Using more recent years would also promote conservation because H&G product has higher recovery rates than surimi product which dominated the whiting fishery in earlier years.

Response: NMFS agrees that northern processors may have a greater opportunity to process larger and higher quality fish. However, NMFS disagrees that using more recent years promotes conservation to any meaningful extent. Any conservation benefit associated with

the alternatives is extremely small and highly speculative, and does not justify selecting an alternative that uses more recent years when considered in light of all the factors.

The EA analyzes the potential biological impacts associated with the alternatives that were considered. Generally, for whiting, harvesting a larger proportion of older fish in any given year is likely to have an upward influence on stock productivity relative to harvesting the same amounts of whiting with a smaller proportion of older fish. In an extreme hypothetical where all harvests were delayed until September of each year—when whiting are typically larger and located further to the north—a 10 percent increase in stock productivity was projected when compared to having all harvest occurring in April.

In contrast, the amount of quota that could initially be shifted geographically and potentially result in changes in the location of harvest is much smaller than in the all-harvest hypothetical above. To begin, the allocation alternatives are unlikely to affect the location of harvest in the mothership fishery or the catcher/processor fishery because these fisheries are not tied to a need for shorebased processing. Together, the mothership and catcher/processor fisheries are allocated 58 percent of the non-tribal commercial allocation (24 percent for the mothership sector and 34 percent for the catcher-processors). Of the remaining 42 percent of the non-tribal commercial allocation given to the shorebased IFQ fishery, the allocation most likely to have any short term effects on geographic area of harvest is the QS issued to processors, which is a maximum of 20 percent of the 42 percent allocated to the shoreside fishery, or 8.4 percent of the non-tribal commercial whiting allocation. The EA also indicates that the effects of initial allocations on the distribution of fishing among communities are difficult to predict because over the long term quota will likely move toward those ports where profit margins tend to be the highest, regardless of the initial

allocations (see EA Section 4.3.3). Using the 10 percent hypothetical result as a maximum, and applying that result to the 8.4 percent of the non-tribal commercial whiting allocation to processors, results in an upper bound on the impact on stock productivity of less than 1 percent. Even this is likely an overstatement, however, given that only a relatively small amount of the quota actually shifts to more northern based processors when comparing the No Action Alternative to Alternative 4 (which most favors recent history).

NMFS also notes that when adding Canadian and Tribal fisheries to the analysis, the potential for conservation benefits becomes smaller. For 2011, the total U.S. and Canadian Total Allowable Catch (TAC) limit was 393,751 mt. The U.S. portion of the TAC was 290,903 mt, which includes the U.S. shorebased allocation of 92,818 mt. The 20 percent of shorebased whiting QS allocated to processors is approximately 5% of the U.S. and Canadian coastwide TAC. NMFS further notes that depending on the strength of the year classes, it may be difficult, even in the northern portion of the fishery, to avoid small fish (see Status of the Pacific hake (Whiting) stock in U.S. and Canadian Waters in 2012, International Joint Technical Committee for Pacific Hake, Final Document 2/29/2012, pages 27-28, http://www.nwr.noaa.gov/fisheries/management/whiting/pacific_whiting.html).

The EA concludes that given the relatively small amount of quota that may be reallocated among geographic regions, the fact that QS trading will likely change geographic distribution regardless of the initial allocations, and considering fleet mobility, the effect of the initial allocations on area of harvest and resulting biological impacts are negligible. Additionally, even assuming recovery rates for H&G products are greater than those for surimi, NMFS does not anticipate that initial allocations to processors will have a significant influence on the type of whiting products produced by processors, especially in the long

term. As a result, there does not appear to be a difference in conservation among the alternatives in terms of product recovery. Also see response to comment 5 addressing the transition from surimi to H&G for the whiting fishery.

In sum, selecting an alternative that uses more recent years in the qualifying period is not justified based on differences in biological impacts and NMFS believes that other considerations justify maintaining the existing initial allocations.

Comment 7: The purpose of considering current and historical harvests for processors is that it allows a council and the Secretary to consider the relative value of investments made in processing capacity early in the development of a fishery compared to the value of investments in processing made late in a fishery that is already heavily overcapitalized. This is one of the considerations that should go into the decision of which years of processing participation are best used for fair and equitable allocations to processors.

Response: NMFS agrees and has concluded that investments in processing capacity made earlier in the fishery should be more heavily taken into account when determining the initial allocation qualifying periods. This is in part because the allocation of quota to processors was intended to minimize disruption to processors that had invested under an expectation of operating under the pre-Amendment 20 fishing regime, and also because any investments made after the announcements of the control date were made at a time when it was evident that the Council was actively pursuing an effort to rationalize the trawl fishery.

Dependence, investment, participation, and latent permits

Comment 8: A significant portion of quota was allocated to permits that had no history of landings in the fishery after 2003. The EA indicated that allocations went to 21 permits that had no participation in the shorebased whiting fishery during the seven years between

2004 and 2010, representing 10.2% of the shorebased whiting quota. Furthermore, the EA also identified that whiting allocations went to 14 permits (representing 9.6% of the quota allocated to the mothership sector) that had no participation in the mothership sector during the same seven years between 2004 and 2010. Considering the number of permits that received quota but have not participated in the fishery since 2003, it is evident that the existing qualifying periods were based at least partially on some industry members' desire to sell their quota and retire. The initial allocations should instead be based on what is best for those currently participating. When considering investment as a measure of dependence, NMFS should focus only on whiting and not on other fisheries.

Response: NMFS acknowledges that quota was allocated to some permits that did not directly participate by harvesting or landing whiting in the whiting fishery in the years between 2004 and 2010. However, NMFS does not believe that this fact warrants including more recent years in the qualifying period because many of the permit owners owned other permits that were active in the whiting fishery during those years, participated in other fisheries including other sectors of the whiting fishery, or held those inactive permits as an investment.

Groundfish fisheries on the West Coast are frequently prosecuted based on a "portfolio" approach where fishermen participate in various sectors or corollary fisheries throughout a given year and between years to maximize benefits. To the extent permits received quota but did not actively participate in West Coast fisheries during the years referenced, the quota was still allocated to the permit owner at the time of initial allocation and reflects the investment of the participant in the permit. As discussed in the EA, a limited entry trawl permit is a highly fishery-dependent investment that must be renewed annually. Public comment, both at the Council meetings and through comments on the proposed rule, also indicated that some fishermen

actively chose to invest in permits in the hope that they would receive initial allocation quota amounts that would accommodate their intended fishing strategies. As noted in public comment on the proposed rule in support of the existing allocations of whiting, the initial harvester allocation to current permit owners recognizes recent participation and investments in the fishery. After the 2003 control date, 18 permits were sold to new permit owners and the permit's catch history went to those new permit owners. Another commenter made a similar comment that business decisions were made to retire vessels after the control date rather than investing in vessel upgrades and maintenance, with the understanding that the intent of the program was to promote consolidation within an overcapitalized fishery. Furthermore, as discussed below, when considering permits that were truly inactive in either the shorebased or mothership sectors of the whiting fishery after 2003, only approximately 1.5 percent of the history based quota was allocated to those permits. Finally, the topic raised by the commenter regarding the business decisions made by those who acquire QS through initial allocation (e.g., whether to sell or lease that quota to another participant or eventually sell the QS/CHA once it becomes transferable) are present irrespective of the qualifying period chosen.

With respect to inactive permits being owned by an entity that also actively participated in the whiting fisheries through the use of other permits, for shorebased whiting permit QS allocation recipients, 4 of the 21 permits referenced by the commenter were owned by entities that also controlled other shorebased whiting permits. Those four permits received No Action QS allocations totaling 2.35% (i.e., 2.9% of the total shorebased whiting allocation to permits). Similarly, 4 of the 13 permits referenced by the commenter (the EA demonstrates there were 13 rather than 14 as stated in the comment, Section 4.5.2.1) that received CHA were owned by entities that also control other MS whiting permits. Those four permits received No Action CHA

allocations totaling 3.8% (i.e., 3.8% of the total MS whiting CHA allocation to permits). In addition, for permits that received either shorebased whiting QS or mothership CHA allocations, there were a total of 15 permits that had no shorebased whiting or Mothership whiting history after 2003. Those 15 permits received No Action Shorebased whiting QS allocations totaling 3.8% (i.e., 4.75% of the total shorebased whiting allocation to permits), and No Action Mothership CHA allocations totaling 1.46% (i.e., 1.46% of the total MS whiting CHA allocation to permits). Six of those 15 permits were owned by entities that also controlled other shorebased whiting permits. Those six permits received No Action shorebased whiting QS allocations totaling 2.46% (i.e., 3.1% of the total shorebased whiting allocation to permits). None of the 15 permits were owned by entities that also controlled other MS/CV whiting permits. When looking at the whiting fishery as a whole, only 1.46% of the CHAs and only 1.65% of the shorebased QS was allocated to permits that were truly latent in both the mothership and shorebased sectors. NMFS defines “truly latent” permits as those that received either mothership CHA or shorebased quota share allocations where the permit itself was not fished in either the mothership fishery or the shoreside whiting fishery, and the owner of the permits also did not fish other owned permits in the mothership or shoreside whiting fishery after 2003.

Additionally, after accounting for participation in other fisheries, including those off Alaska, there were a total of only nine permits (shorebased or mothership) where the owner apparently had no fishing activity off the West Coast or Alaska after 2003. These nine permits translate into only 1.3 percent of the shorebased QS and 1.0 percent of the mothership catch history assignment used for the 2011 and 2012 fisheries.

Accordingly, the existing allocations allocate only a very small portion of quota to permits that are held by owners that did not participate in whiting, West Coast, or Alaskan fisheries or own other permits that did participate after 2003.

Comment 9: NMFS seemed to have difficulty defining dependence although the meaning of dependence in the MSA is clear and means to rely upon the fishery for financial support and income. Also, it is not fair and equitable to give quota to permits which, based upon the available objective information, did not participate in the fishery for some time and arguably no longer demonstrate any financial dependence on the fishery.

Response: NMFS did not have difficulty defining dependence in the proposed rule. In the proposed rule, NMFS noted that the MSA does not provide a definition of dependence, provided an explanation of the meaning of dependence, and noted that factors related to dependence may be measured in numerous ways. As stated, in general terms, dependence upon the fishery relates to the degree to which participants rely on the whiting fishery as a source of wealth, income, or employment to financially support their business. Current harvests, historical harvests, levels of investment over time, and levels of participation over time are all aspects of dependence, as they can all be connected to the processes that fishers and processors use to generate income. For purposes of this decision, NMFS believes that including all potential sources of income in assessing the level of dependence is appropriate.

NMFS also considered the Council's approach as discussed in Section 5.4.2 of the EA. The EA cites the NOAA technical memorandum "The Design and Use of Limited Access Privilege Programs," (Anderson and Holliday 2007), which notes that "various measures of dependence on the fishery [exist] including percent of revenue or opportunities to participate in other fisheries, and inter-relations with other fishery related business especially with respect to

employment.” The existing initial allocations do not provide history based quota to harvesters after 2003 or processors after 2004. As described above, that does not mean that investment and dependence during that period were ignored. Rather, the issue of investment and dependence for more recent years has been thoroughly explored, and there are valid policy reasons for excluding those years as discussed elsewhere. One important fact to recognize is that most current harvesters and processors in the fishery were also historical participants during the qualifying periods for initial allocation, and the shifts in quota among the initial allocation alternatives considered were relatively modest overall and for a majority of the participants. Permit owners receiving initial allocation received quota reflecting their historic participation and current permit ownership (reflective of dependence and investment) as well as a share of the buyback quota that was equally distributed.

Comment 10: Catch history years should be 1994-2010 or 2000-2010 to be fair and equitable and permits with no active involvement after 2004 should not be allocated whiting quota. Another commenter stated that NMFS should adopt 2000-2010 for the catch history years and adopt a present participation requirement that would require permits to have landed at least 500 mt of whiting in the period 2003-2010 to recognize the factors required for consideration in allocation decisions.

Response: As discussed in the preamble and in response to other comments, NMFS has concluded that excluding years beyond 2003 for harvesters and beyond 2004 for processors results in a fair and equitable allocation. Selecting an alternative that would include years beyond the existing cut-offs would be contrary to the policies underlying Amendment 20. Requiring permits to have landed at least 500 mt of whiting in the period 2003-2010 is not necessary to recognize the factors required in consideration of an allocation decision. Furthermore, adopting a

present participation requirement for the period of 2003-2010 that would exclude any inactive permits would be inconsistent with the Groundfish FMP history since the Council rejected “Use It or Lose It” rules in 1994 relating to the development of Amendment 6 to the FMP (adopting the limited entry program). Similarly, requiring a participation requirement spanning the years after the announcement of the control date creates an incentive and a reward for increasing participation at a time the Council was attempting to address overcapitalization. Finally, the requirement suggested by the comment could undermine decisions made relative to investments in permits.

Comment 11: It is instructive that other fishery management councils are considering the problem of allocation of quota to license holders with minimal history or participation. The North Pacific Council, in a February 2013 problem statement stated that “distributing shares with minimal history may be argued to be inconsistent with the requirement to allocate shares based on fishery dependence.” Further, in a footnote, the council paper noted that acquisition of a permit “is clearly an investment in the fishery,” but “reflects only an investment in a fishery privilege, and not an investment in a fishery operation.” (Citing Item C-3(b) for the upcoming North Pacific Council meeting).

Response: First, NMFS notes that the Pacific Council and NMFS considered investments in and dependence upon the fishery in making this decision on whiting allocation. Second, NMFS notes that when fishery management councils develop catch share or other programs, councils may choose to weigh the factors differently based on the specific facts before them, including the factor of dependence and investment. NMFS notes that for purposes of the Pacific groundfish fishery and the decision on reallocation of initial whiting quota, a permit is viewed as a highly fishery dependent investment. Permits have no alternative use outside of accessing the

trawl fishery; therefore permit owners are entirely dependent on the trawl groundfish fishery for recovery of their investment in permits. Other fishing assets, such as vessels, have some value in alternative uses.

Employment

Comment 12: Several commenters addressed the issue of employment. Some commenters expressed concern that companies that have scaled down their employment more recently would qualify for more quota based on their historical participation, while companies with larger recent harvesting and processing history will lose employment if they cannot afford to lease or buy quota. Another commenter stated employment on catcher vessels that benefitted from improved market conditions during 2000-2010 will be strongly disadvantaged given a 1994-2003 qualifying period because their quota shares will be less than their participation in recent years. Another commenter said 1994-2003 (status quo) maintained, on average, their fleet's historic and current access to whiting, their number of vessels, and their number of crewmember jobs in both the shorebased and mothership fisheries. Another commenter noted the analysis shows that overall the stability or level of employment does not vary much between all alternatives, including status quo; however, there are anticipated effects on individual fishing businesses based on any change from status quo.

Response: The final EA addresses impacts to employment (see section 5.4.3.5). While there may be some initial local shifts or variations in employment among the alternatives, the analysis did not anticipate notable variations in the stability or level of employment overall. As discussed elsewhere in the responses to comments, the relatively modest differences in the alternatives overall and for a majority of individuals also likely means even initial changes in

employment will be limited. Overall, NMFS believes it has adequately considered impacts to employment in the harvesting and processing sectors in arriving at its decision.

Leasing, competitive advantage, and efficiency issues

Comment 13: Quota allocation to processors can provide a significant competitive advantage. Processors are unique from harvesters in that their investments are rooted to the community and the local fisheries that support that community, making dependence different for a processor than for a harvester. Initial allocations should use processing history from 2000-2010 because that period of time captures current and historical harvests and reflects a period of time when the fishery had recovered from being overfished and reached record revenues for fishery participants. Some processor companies made significant investments over the last decade to upgrade their facilities that supports using more recent years.

Response: NMFS is aware that initial quota allocation may provide advantages to one processor over another. However, given that the overall amount of quota that may shift between processors is only 3%, the degree of competitive advantage or even its existence depends on the business decisions of the quota recipient and numerous other considerations such as processor location, presence of local competition, access to markets, fleet dynamics, and status of the whiting stock, among other factors.

One main purpose of allocating 20 percent of the shorebased whiting quota to processors was recognition of the significant processing investments that had been made in reliance upon the fishery prior to the announcements of the control date and the development of Amendment 20. The allocation to processors was, in part, an attempt to minimize the disruption during the transition to the new system and provide some consideration and measure of stability. (See EA section 10.1, statement of Mr. Anderson; Amendment 20 EIS, Section 2.6.6).

NMFS and the Council acknowledge that testimony indicated that investments were made by some processors after 2004, including investments in infrastructure to process other stocks, such as sardines. However, it is reasonable to provide initial allocations more heavily weighted to reflect the investments and dependence on the fishery that occurred prior to the time it was evident that the Council was pursuing a change to the management system. Development of the trawl rationalization program could be most disruptive to processors that invested prior to 2004 because the program was likely to result in changes to the timing of landings, and potentially result in fewer vessels participating in the fishery—part of the effort to reduce overcapitalization. Given the establishment of the 2003 control date and subsequent clarification after the 2004 season that the 2003 control date could apply to processors, businesses that entered the processing sector or made investments after 2003 did so with a degree of risk regarding receiving any initial allocations or larger allocations.

NMFS recognizes that how quota is initially allocated to processors has some influence on the competitive advantage of processors between themselves and with respect to new entrants, including the potential for increased bargaining power with harvesters. However, other processors may have locational advantages whether it is to infrastructure (e.g., cold storage facilities, highways, water supply and waste removal) or closer access to the resource itself (some processing of whiting has occurred in inland locations). Northern processors, in addition to being located closer to where much of the harvest has recently occurred, also have a locational advantage in the sense that they have more immediate access to tribal whiting resources as tribal fisheries are located in northern Washington. Since 2003, one processor in particular has processed over 99% of the tribal shorebased whiting harvests.

Any competitive advantages processors gain under the alternatives are relatively modest given that the entire allocation is only 20 percent of the shorebased fishery. Overall, only 3 percent of the processor quota shifts from status quo holders to others, and the levels of shift among most individual processors are similarly modest, especially when compared to overall volumes of fish processed and revenues generated.

Additionally, although the effect is relatively modest, based on the analysis in the EA regarding the potential for northward shift in quota, and public comment relative to the competitive advantages for processors from being allocated quota, maintaining the existing initial allocations rather than selecting an alternative that uses more recent years could also help mitigate negative impacts resulting from localized concentrations of fishing and processing effort while providing the initial allocations necessary for the trawl rationalization program to function.

Comment 14: One commenter stated that five new processors entered the fishery after 2004 and that NMFS failed to explain why it is rational to exclude these new entrants. For example one processor that went out of business in 2000 received quota under the existing allocations but a processor that began processing whiting in 2006 and has risen to become a significant player in the whiting market received no quota.

Response: NMFS did not allocate quota to processors that went out of business. For processors that would have been allocated quota but did not exist at the time of initial allocation, that quota was distributed to the other qualifying processors proportional to their initial QS amounts. Any new entrant after 2005 is in the same situation as a new entrant in 2012, as neither would have initially allocated quota and would need to purchase or lease quota if doing so was a desired part of their business strategy. After the 2005 clarification that the 2003 control date applied to processors, new entrants were on notice that their history might not count towards

initial allocations. NMFS notes that depending on how processor is defined (e.g., company, buying/processing site, etc.) the number of new processor entrants after 2004 will vary. The EA notes that eight processors entered the shorebased whiting processing market for the first time after 2004 and did not receive an initial allocation, and of these eight processors only two consistently processed whiting since entering the fishery.

Comment 15: The cost of leasing quota was not appropriately analyzed or considered. The added costs of purchasing or leasing quota from inactive permit holders is contrary to National Standard 7, which states that “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” In addition, the costs associated with increasing observer costs, the Pacific Coast Groundfish Fishery buyback program and the soon to be implemented cost recovery program are new costs that NMFS failed to consider when making a decision as to whether the initial allocation of quota should be changed or not. The costs associated with leasing quota will be particularly constraining on smaller businesses. Local small community companies need whiting quota to keep their businesses going. Larger processing companies can afford to lease or buy IFQ no matter what the price. Smaller, family-owned vessels will be lost over time to corporations owning multiple vessels or other assets. One of the commenters also made an attempt to estimate the fair market values and leasing costs of whiting quota. The projections were approximately as follows: value of shorebased whiting allocated to the 21 permits that were reportedly inactive during 2004-2010 is \$8,500,000 and that the annual cost of leasing this IFQ is conservatively \$680,000. For the mothership sector, the fair market value of the whiting quota allocated to the 14 permits reportedly inactive during 2004-2010 is \$4,320,000 and that the annual cost of leasing this quota is near \$350,000.

Response: Leasing is an expected activity in many fisheries. Before the trawl rationalization program, limited entry permits were being leased by fishermen in order to gain access to trawl fisheries. Consistent with the MSA requirement to establish a policy and criteria for transferability, through sale or lease, of limited access privileges such as whiting IFQ, 16 USC 1853a(c)(7), the ability to lease quota was an element of the trawl rationalization program analyzed and adopted through Amendment 20. Some level of leasing is expected under the program. Leasing is expected in the Shorebased IFQ Program in particular given that 20% of the whiting catch history-based quota of shorebased harvesters was allocated to processors—as a result many shorebased whiting fishermen, especially those not strongly affiliated with a processor, may have to lease quota to return to pre-trawl rationalization catch levels.

The environmental impact statement for Amendment 20 (Amendment 20 EIS) considered the economic condition of the fishery, which was one of the motivations for considering alternate management approaches for the trawl fishery. The Amendment 20 EIS also considered efficient utilization of the resource in the design elements of the program, especially compared to the previous trip limit management fishery. It also weighed the costs and benefits of such a program, including initial allocations and leasing costs, on different user groups such as harvesters, processors, and potential new entrants for the IFQ and MS fisheries (see Amendment 20 EIS sections 4.4, 4.6.2.5, 4.6.3.4, 4.6.3.7, 4.7.2.3, 4.9.2.2, and 4.9.3.7). The issue of leasing costs was also addressed in the final rule implementing the trawl rationalization program. (75 FR 60868, 74 October 1, 2010, Comment 27).

In addition to the Amendment 20 EIS, the EA for the reconsideration of whiting allocation weighed the costs and benefits of allocation on different user groups, including harvesters, processors, potential new entrants, and communities for the IFQ and MS fisheries

(see EA sections 4.3, 4.5.3, 5.4, and 5.8). The EA also discussed costs of leasing in other fisheries and potential effects on Pacific groundfish fisheries (EA section 3.3.2.6 and 4.5.3.1), and the value of limited entry permits as an investment whether actively fished in recent years or not (EA section 3.3.2.5 and 4.3). Regarding leasing costs, the EA for this action recognized that leasing costs will occur, that the benefits of the program (which requires an initial allocation) outweigh the costs, and that, ultimately, quota will tend towards the most efficient users, especially once trading is allowed.

NMFS recognizes that those receiving initial allocations may be placed at a competitive advantage over new entrants or existing participants who must purchase more quota if they desire to maintain their recent harvest levels. (EA section 5.4). However, any new costs associated with leasing also come with new benefits—the opportunity to acquire a desired amount of quota that can then be harvested without competing in a race for fish, along with the other benefits anticipated under the trawl rationalization program. The EA demonstrates that quota was transferred to many shorebased whiting fishermen in 2011, allowing successful harvest well in excess of some participants' initial allocations. (EA section 3.3.2.7).

NMFS also considered the costs associated with the buyback program that was implemented in 2005 (70 FR 40225, July 13, 2005). The loan associated with the buyback program financed most of the cost of a fishing capacity reduction program in the Pacific Coast groundfish fishery and corollary fisheries. To repay the loan, participants in the Shorebased IFQ Program and the MS Coop Program currently pay five percent of the full delivery value of fish harvested and delivered to processors. In addition, the MSA requires that cost recovery be a component of a LAPP such as the trawl rationalization program. Under the proposed cost recovery program (78 FR 7371, February 1, 2013), participants in the Shorebased IFQ Program and the MS Coop

Program would be required to pay a fee, not to exceed three percent of the ex-vessel value of fish delivered to processors, to cover part of the costs of management, data collection, and enforcement of the trawl rationalization program. Costs associated with the trawl rationalization program, including the costs of observer coverage, were also considered in the Amendment 20 EIS, section 2.6.3, A-2.3.3. NMFS notes that the agency currently covers the majority of the costs for observers off the West Coast (but not the North Pacific). NMFS also notes that there is a national effort underway to explore the use of electronic monitoring as one potential tool to address the costs associated with observers. See

http://www.nmfs.noaa.gov/sfa/reg_svcs/Councils/ccl_2013/K_NMFS_EM_WhitePapers.pdf.

Although some alternatives could more closely align initial allocation amounts with recent levels of harvest associated with a given permit, and potentially minimize leasing costs to those participants in the short term, when balanced with the other considerations, NMFS has determined that the Council's recommendation is consistent with National Standard 7 and minimizes costs to the extent practicable. The costs associated with the buyback program (which benefitted the industry by helping to reduce the level of overcapacity and substantially expanded fishing opportunity for all vessels, as reflected by higher trip limits), the observer program, and the statutorily required cost recovery program, do not alter NMFS' conclusion. NMFS notes that some commenters felt that NMFS did properly analyze and consider the impact of the initial allocation on costs and benefits, as required by National Standard 7, and that status quo balances costs and benefits by allocating to a large amount of recipients with a geographic spread among those that received initial allocations.

The commenter that provided estimates of fair market values of quota and leasing costs used a multiplier of 3.75 applied to the ex-vessel value of whiting to determine fair market value

of whiting QS. NMFS does not have sufficient information to evaluate the use of a multiplier of 3.75 to project the value of quota, particularly as quota has yet to be traded. However, the EA considered that the ratio of QS to ex-vessel value ranged from 4:1 to 9:1 in a Canadian groundfish trawl fisher might be representative. Based on information developed from quota pounds sold or leased via the [Jefferson State Trading Company](http://jeffersonstatetradingco.com/cgi-bin/auction/auction.pl) website (<http://jeffersonstatetradingco.com/cgi-bin/auction/auction.pl>), which tracks the trading of quota pounds for this program, the leasing ratio of 30% of the ex-vessel value may be high but representative. Even assuming that the projections provided by the commenter are accurate, it does not alter NMFS conclusions for the reasons described above and throughout this final rule.

In response to the comment about the impacts of costs on smaller businesses, and smaller, family-owned vessels, in general, impacts of the allocation decision on both small and large businesses were considered, and regulations are in place that attempt to minimize any undue burden placed upon small businesses (e.g., accumulation limits). As discussed below in the summary of the final regulatory flexibility analysis (FRFA), over the years 1998 to 2010, there were 17 processors that participated in the fishery and that meet the recent participation criteria of the various alternatives. After taking into account ownership and affiliation relationships, there are 12 processing entities based on Small Business Administration (SBA) definitions. Of these 12 processing entities, there are 9 small processing entities and three large processing entities that are affected by this rule. The FRFA also notes that regardless of the allocation alternative chosen some small businesses will be affected.

As discussed in response to comment 14, although NMFS agrees that in some circumstances the initial allocations of quota could result in some degree of competitive advantage, the degree of that advantage is dependent on numerous factors. Furthermore, owning

whiting QS is not required to process whiting. New entrants or processors with lower initial allocations may choose to lease or purchase quota as part of their business plans, but may also use other methods to incentivize delivery of whiting to their facilities. Furthermore, any advantages processors may gain under the alternative considered are relatively modest given the entire allocation is only 20 percent of the shorebased whiting QS, overall only 3 percent of the processor quota shifts from status quo holders to others, and the levels of shift among most individual processors are similarly modest, especially when compared to overall volumes of fish processed and revenues generated.

Comment 16: An article critical of the effects of leasing in the Canadian halibut fishery, “The elephant in the room: The hidden costs of leasing individual transferable fishing quotas,” Evelyn Pinkerton, Danielle N. Edwards, *Marine Policy* 33 (2009) 707–713, was not sufficiently considered in the context of whether the existing allocations are consistent with National Standard 5, which states that “Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.” The failure to give the most quota to the most active participants through 2010 creates new leasing costs and is not justified in terms of economic objectives.

Response. NMFS considered the article referenced by the commenters, and its position that certain conditions that allow for the efficiency benefits of individual transferable quotas (ITQs) to accrue are not present in the Canadian halibut fishery; therefore, the authors argue in part that vessels operating with initially granted quota are more financially viable than new entrants and can afford to pay higher quota lease fees, eventually having the effect of bidding up the lease price.

NMFS notes that there was also a published comment in response to this article questioning the article's data and assertions. (A rejoinder to E. Pinkerton et al. The elephant in the room: The hidden costs of leasing individual transferable fishing quotas, Bruce R. Turris, *Marine Policy* 34 (2010) 431–436). One of the main conclusions of the published response was that it would be incorrect to suggest that quota will not be transferred to the most economically efficient operators. The commenter noted that even with transaction costs and other limitations, tradable quota should move to more efficient operators, and further noted that those who initially start out with quota may be more profitable than new entrants or those that need to lease more quota, but that issue is one of income distribution and not an efficiency issue. The initial authors published a short response to the comment, asserting that the commenter did not directly address the major points of their article and that their data analysis was appropriate. (Ignoring market failure in quota leasing? Evelyn Pinkerton, Danielle N. Edwards. *Marine Policy* 34 (2010) 1110–1114.)

The debate appears to be one of whether the halibut program in Canada is achieving efficiency at all or whether the halibut program is more efficient than the former derby style of fishery it replaced. This debate is also about the distribution of rent—who shares in the profits or income generated in the fishery. The debate is not whether there have been efficiency gains, but whether additional gains can be achieved. Pinkerton claims they have not achieved full efficiency because of market inefficiencies and the lack of access to capital for some participants. However, it is not clear why participants who were granted quota would not try to be as efficient as possible and why they would not get out and lease their quota if they were less efficient. High lease prices may suggest that efficiency is high as owner operators are making high profits and are unwilling to lease quota to other fishermen unless the lease price is at the

level where it is more profitable to lease than fish. In terms of the reconsideration of initial whiting allocations, these articles discuss the effects of leasing, which was a component of Amendment 20 and will exist regardless of the years chosen for determining the allocation of quota. See response to comment 15.

With respect to the net economic benefit to the nation, the effects of the alternatives are similar. The initial allocation of whiting is a one-time distribution of wealth in the form of QS and CHA to members of the fishing industry, which allows for implementation of the program. In addition to assisting existing participants' transition to the new management system, the initial allocation will likely affect harvester and processor competitiveness. To the degree that initial allocations match up with the harvesters that will use the quota, transition costs will be lessened. However, whatever initial allocation alternative is selected does not affect the long-term efficiency and operation of the fishery. In the short run, there may be transition costs and disruption to participants' operations depending on how closely the initial allocations are distributed to the most efficient participants. To the degree that initial allocations match up with the harvesters and processors that will use the quota, transition costs and disruption will be lessened as the fishery moves to its long-term, more efficient state. Regardless of the allocation alternative chosen, it is unlikely that the initial allocation will be that allocation that represents the most efficient users. NMFS does not currently know which users are the most efficient and which users in the future will be the most efficient. Note that the biggest users of the resource may not be the most efficient users. Over the long term, it is expected that operations will move, or quota will be traded, to the ports in which the highest profits can be earned, taking into account all forms of costs such as average distance to fishing grounds and catch and bycatch rates.

With the choice of maintaining the existing initial allocations over alternatives that reflect more recent history, NMFS and the Council are providing to those who have historically participated in the fishery (the majority of which are also recent participants) and are anticipated to have a better chance to benefit from the market processes described above. NMFS considered how the short and long term impacts of leasing may vary between the alternative whiting allocations and has concluded that the benefits of more heavily favoring history prior to the end of the existing qualifying periods furthers the purposes of Amendment 20, rewards investments and dependence consistent with the policies underlying announcing a control date, and minimizes disruption to those participants that made business decisions based on the assumption that quota formulas were unlikely to include more recent years.

With regard to the comment on National Standard 5, the trawl rationalization program was designed, in part, to reduce fleet capacity and to economically rationalize the groundfish trawl fishery. Reducing excess capacity is expected to improve the efficiency in the utilization of fishery resources as well as reduce the levels of incidental catch. NMFS' decision to maintain the initial whiting allocations would not change any of those program design features that would allow more efficient utilization of the resource, such as reductions in fleet capacity, reduced regulatory discards, and once the moratorium is lifted, quota trading. After considering the relevant factors, including costs associated with leasing, NMFS has determined that the existing initial allocations consider efficiency in the utilization of fishery resources, where practicable, and are consistent with National Standard 5.

Comment 17: The North Pacific Council has recognized the problem of absentee ownership of crab harvest shares by persons or corporations with little or no involvement in the prosecution of the fisheries, which limits the amount of quota available for active participants in

the Bearing Sea/Aleutian Islands (BSAI) Crab Rationalization Program. The same problem exists in the Pacific whiting fishery under the status quo allocations.

Response: NMFS agrees that the North Pacific Council is considering the issue of absentee ownership of crab harvest shares, and notes that in its report of the February 2013 North Pacific Council meeting, the Council:

elected to take no further action considering alternatives to define active participation requirements for vessel owner harvest shares. Currently, holders of those shares have no ongoing requirement to remain active in the fisheries as either vessel owners or crewmembers. The Council also received a discussion paper concerning the development of cooperative measures to i) promote share acquisition by action participants; ii) address high quota lease rates; and iii) ensure reasonable crew compensation. Although the Council elected to take no regulatory action, it expressed concern with high lease rates, crew compensation, and the availability of quota shares to active participants in the fisheries. To that end, the Council passed a motion requesting that each cooperative in the program submit a voluntary report annually describing measures taken by the cooperative to facilitate share acquisitions by active participants and affecting high lease rates and crew compensation.... The motion suggests that these reports be provided at the Council's October meeting.

News and Notes, North Pacific Fishery Management Council, February 2013, page 4, available at <http://www.fakr.noaa.gov/npfmc/PDFdocuments/newsletters/news213.pdf>.

Relative to the reconsideration of the initial allocation of whiting, NMFS acknowledges that in the future there may be similar issues that need to be considered and potentially addressed

during the five year review. However, the crab rationalization program and the Pacific groundfish trawl rationalization program are significantly different and it is not possible to predict that the issues and potential solutions will be the same.

Comment 18. NMFS should determine how many of the inactive, or latent, permits from 2004-2010 actively harvested their whiting allocations during the post-rationalized fishery, 2011-2012.

Response: NMFS considered the information in the final EA, which shows the number of permits that did not land fish in 2011. Information for 2012 was not available for use during the reconsideration.

Comments on Control Date

Comment 19: Control dates are merely advisory and do not obligate the Council or NMFS to use them. The MSA does not contain any overarching considerations such as a control date that trump the National Standards and other statutory criteria. The control date should not be used as a basis for maintaining the existing initial allocations.

Response: NMFS acknowledges that a control date is not a guarantee that any specific period will count toward initial allocations. NMFS believes, however, that recognition of the business and investment decisions made by participants who interpreted the control date as signaling the likely end of the qualifying period is consistent with the fundamental purposes of Amendment 20, including reducing overcapacity. Commenters supporting existing allocations noted that it is important to adhere to control dates to prevent speculative increases in harvesting or processing, and that doing so supports a fundamental objective of the program to address longstanding overcapacity issues in both the harvesting and processing sectors of the whiting fishery. The overarching considerations described in the propose rule reflect consideration of

the factors identified in National Standard 4 and the MSA provisions at 16 U.S.C.

1853a(c)(5)(A) in light of all relevant factors, including the other National Standards and the control date. After considering those factors, and taking into account public comment on the proposed rule, NMFS has considered all of the factors related to the initial allocations and has concluded that use of the 2003 control date as the cut-off period for harvesters, and use of 2004 for processors is rational. As described in the preamble and in response to other comments, the control date and the underlying policy goals of Amendment 20, while important, are not the sole basis for NMFS' decision.

Comment 20: While it was a lengthy process between announcing the control date and implementation, the process was lengthy because of the complexity of the trawl rationalization program, including the allocation decisions. The control date could not be considered “stale” because there was no period of inactivity between the control date and implementation, there was no major change in the broad policy fishery managers were pursuing or in the fundamental design of the program.

Response: NMFS agrees that the control date is not “stale.” The EA documents the extensive process required for developing the trawl rationalization program and the numerous stages for stakeholder input. (EA table 1-1, 1-2). Considering the amount of time necessary to develop the program, the length of time between the control date and program implementation, as well as this reconsideration, is reasonable. Furthermore, NMFS has not ignored the years beyond the control date, but rather has considered all the required information, including harvests after 2003, in deciding to maintain the existing initial allocations.

Comment 21: Not adhering to control dates as announced when allocating initial quota sets a dangerous precedent, and could potentially result in increased harvesting or processing

capacity in an attempt to increase the initial allocation of quota in the development of future limited entry or limited access privilege programs (LAPPs). Relying on the control date is consistent with National Standard 4 and the groundfish FMP management goals that list conservation as the first goal, as well as the Amendment 20 EIS that states that failure to use a control date may exacerbate conservation concerns. Several other commenters also noted that they would benefit by receiving increased harvester allocations if more recent years were included, but they believe that reliance on the control dates is fair because everyone in the fishery knew the consequences of fishing after the control date and therefore support the existing allocations.

Response: NMFS agrees that, in general terms, control dates serve a useful purpose of deterring speculative increased capacity or effort during the development of LAPPs. NMFS further agrees that not using the announced date of 2003 for harvesters could have a negative effect in the future when the Pacific Council or other councils begin to consider limited entry or LAPP programs, and further notes that there is a rational basis for modifying the control date by one year for processors. Further, NMFS believes that the reliance on the control date expressed by many commenters benefited the underlying purposes of Amendment 20 pending its implementation. The fact that several participants commented that they would benefit financially from selecting an alternative that uses more recent years, but nevertheless support the existing allocations, is indicative of the fairness and equity of the Council's recommendation and NMFS' decision.

Comment 22: Harvests after the control date should be rewarded because fishing and processing was happening in the Pacific coast whiting fishery where and when there were market opportunities.

Response: As noted in the proposed rule, no mechanism exists to separate speculative from non-speculative effort after the control date and by maintaining the control date for harvesters, any speculative behavior after the control date is not rewarded and those who acted consistent with the control date and goals of Amendment 20 are not penalized. As explained in this final rule, and after consideration of the statutory factors, NMFS has determined that the control date of 2003 as the cut-off for the harvester qualifying period is rational, as is the use of 2004 as the cut-off for the processor qualifying period, and the end result is a fair and equitable initial allocation.

Comment 23: The policies supporting a control date for harvesters do not apply to processors, and are at best a theoretical and indirect concern. Processor interests in acquiring quota are to ensure that fish continue to support the processing plants. Processors do not speculatively increase capacity to acquire quota as an asset to later be bought, sold, leased, or traded. Testimony at the June 2012 Council meeting indicated concern about undercapitalization in the processing sector, not overcapitalization.

Response: The control date was intended to put the industry on notice and deter speculative increases in effort and capitalization, regardless of sector. Section 3.3.2.4 of the EA discusses the key indicators that were used to identify overcapacity issues within the fishery. Fishing season length is a key indicator of overcapacity in a fishery because in the absence of excess capacity, a fishing season could potentially run through December 31, assuming other constraining factors are taken into account. Although allowable harvests increased in the years from 2004-2010, season length in the shorebased whiting fishery decreased during this period. The weekly harvest pattern for the shorebased fishery during this period demonstrates substantial excess capacity. Fleet weekly harvest was used as a proxy for effort and capacity in the

shorebased sector (both harvesters and processors). Even if the fleets were capable of sustained fishing at only one half their lowest annual maximum weekly rate, the amount of time required to take the maximum allocation available in recent years would be far less than the potential number of season days available. Despite a situation of excess capacity, after 2004 the number of vessels participating was generally on an upward trend in both the shorebased and mothership sectors. While one commenter noted that with respect to processors, speculation and overcapacity was a theoretical or indirect concern, another commenter noted that in industrial fisheries like Pacific whiting, all harvests are landed and processed. Therefore the harvest and subsequent processing of that harvest provides a proxy for investments and dependence in the fishery by harvesters and processors. The purpose of applying control dates to onshore processors, while important, is not necessarily as significant as for harvesters, who have a greater ability to move into and out of various fisheries to gain potential fishing history. In addition, comments on the proposed rule and public testimony at Council meetings noted that including 2004 in the qualifying period for processors takes into account more recent investments that were made in 2003 but that did not come online and start acquiring history until 2004. These factors, in addition to the fact that it was not clear until 2005 that the 2003 control date potentially applied to processors, support the decision that a one year shift, to 2004, was a reasonable cutoff date for processors.

Although one commenter testified at the June 2012 Council meeting that the shorebased processing sector was undercapitalized, other public testimony indicated that the fishery was heavily overcapitalized and there was no shortage of processing capacity available, and that the control date was meant as to deter the entire industry from injecting more capital into an already overcapitalized fishery, or at the very least put them on notice that doing so was not guaranteed

to be rewarded by being credited for initial allocations. NMFS also notes that a commenter asserted that those who made investments in harvesting and processing capacity later in the development of a fishery, after it was already overcapitalized, have made investments that are at a net loss to society and therefore should not necessarily be rewarded for their investments with allocations of quota.

Control dates are largely preemptive tools meant to signal that speculation will not be rewarded. NMFS is unable to determine whether speculation would have been worse had no control date been issued. However, in the absence of a control date, that incentive would have been present. For all these reasons, NMFS believes it is appropriate to continue to apply the 2004 cut-off date to processors.

Comment 24: The Federal Register notices regarding the control date were unclear on how the control date applied to processors, even after the clarification in 2005.

Response: NMFS agrees that the original announcement of the 2003 control date, 69 FR 1563, did not explicitly state that it applied to processors. However, the notice published in 2005, 70 FR at 29714, reiterated the 2003 control date and clarified that it did not preclude processors from participating in the trawl rationalization program and being eligible for quota. The original announcement that was clarified stated that the control date “will apply to any person potentially eligible for IQ shares,” but the list of eligible persons did not include processors. In clarifying that processors could be eligible for initial allocation, the 2005 notice included processors as an entity eligible for IQ shares to which the 2003 control date would apply. However, NMFS recognizes that processors were not expressly included until after the end of the 2004 season and thus potentially not on notice, which is one reason why NMFS determines that it is reasonable to extend the cut-off for processors to 2004.

Comments on current and historical participation of fishing communities

Comment 25: The Council and NMFS considered current and historical participation of fishing communities, partially through the allocation of quota to processors. The existing allocations spread the processor allocation along the coast among seven processors in five communities from Westport, WA to Eureka, CA. All of the alternatives other than the No Action Alternative would shift quota north devaluing the FMP objective to protect communities.

Response: NMFS agrees that the record reflects that maintaining the existing allocations would provide a more even distribution of initial whiting allocations along the coast and to the corresponding fishing communities. Shifting to alternatives favoring more recent history could contribute to a northward shift in initial quota distribution, and accordingly any benefits stemming from that initial allocation (see EA, Section 4.3.3). The northward shift is expected to be relatively small (less than 8 percent of the total quota—2 percent for processors and 6 percent for harvesters between the No Action Alternative and Alternative 4) and the analysis shows whiting landings have been shifting northward in recent years (due to fish availability and investments in ports). Some commenters noted that this northward shift would benefit two processors at the cost to all of the remaining processors. Similarly, a few harvesters would benefit at the cost of many. Although the shift in quota would be relatively modest, NMFS believes that maintaining the initial whiting allocations supports historic fishing communities in more southern locations and creates a wider geographic distribution of the initial wealth associated with allocations. Maintaining initial whiting allocations would further support one of the guiding principles in the development of Amendment 20 (see Am 20 EIS, Section 1.2.3)—to minimize negative impacts resulting from localized concentrations of fishing [and processing] effort. For processors, in addition to the distribution of wealth associated with initial

allocations, the wider distribution of initial allocation of whiting QS may provide some additional influence over where deliveries are made along the coast than if the initial allocations are based on more recent qualifying years that would shift allocations and potentially landings northward. However, as discussed in response to other comments, it is difficult to determine the degree of competitive advantage or the impacts of the geographic location of QS allocated to processors on location of future harvest. Ultimately, the QS issued to processors should assist in mitigating for the changes expected in the timing and location of harvest expected over the long-term under the trawl rationalization program.

Comments on industry support for allocation

Comment 26: One commenter said that the law is clear; NMFS cannot make the decision about the proper allocation method based on political considerations or popularity, only on the facts of the case and the applicable law. In addition, no referendum was held so it is impossible to determine exactly the degree of support for the initial allocation system.

Response: NMFS agrees that the agency cannot make the decision based on political considerations or popularity. As described in detail in this final rule, the agency has independent reasons that support its decision to maintain the existing initial allocations. NMFS further agrees that the agency cannot determine exactly the “degree of support” for the agency’s adoption of the No Action alternative because a referendum was not held; however the record is clear that the majority of participants that commented during the Council process and on the proposed rule support the Council/agency proposal. The extensive and transparent public process followed for this reconsideration, and the fact that a majority of commenters support the Council’s recommendation, including some of those that would receive higher allocations under other

alternatives, is one factor that the agency considered. Irrespective of the degree of industry support, NMFS believes the agency's decision results in a fair and equitable allocation.

Comment 27: Several commenters stated that they supported the existing initial allocations and noted that the Council and NMFS did a thorough and transparent reconsideration process, in which a major portion of the affected stakeholders participated.

Response: NMFS agrees.

Comment 28: Some commenters noted that industry continues to support the No Action Alternative as a fair and equitable decision that balances the necessary conditions, avoids disruption to the fishery, and upholds the validity of control dates and the integrity of the Council process. Industry support for the No Action Alternative is highlighted by several members of industry who would benefit under alternatives that included years after the control dates, yet they continue to support the No Action Alternative for the same reasons.

Response: NMFS agrees that the no action alternative is a fair and equitable allocation. A review of the record indicates that there were members of the industry that testified or commented in support of the No Action Alternative, although they would stand to benefit through a revised initial allocation. Any allocation scheme will create winners and losers. NMFS acknowledges the fact that some members of industry who might gain quota under other alternatives still support maintaining the existing initial allocations.

Comment 29: The trawl rationalization program (including the status quo initial allocation) has generated conservation benefits for groundfish stocks and economic benefits for the fishing industry and communities. Discards of overfished species have dropped dramatically, and per vessel revenues have increased, despite the fact that the fishery was previously overcapitalized, had been subject to overfishing, and had been declared an economic disaster in

2000. Several comments supported maintaining the existing whiting allocations and emphasized: the importance of honoring the control date and the underlying policy goals of Amendment 20, the fact that those who increased effort or capitalization post the control date did so with notice any history earned may not count towards an initial allocation, and the protection of historic fishing communities and a wider distribution of the initial allocations among those communities.

Response: NMFS agrees and has concluded that the reasons supporting maintaining the existing allocations for the shorebased IFQ and mothership whiting fisheries (e.g., taking in to account the intent of the 2003 control date and the policy goals of Amendment 20, not rewarding speculative behavior, minimizing concentration of quota, and achieving wider geographic distribution of initial program benefits) outweigh the reasons supporting alternatives that favor more recent history (e.g., providing greater amounts of quota to the recent fishery participants to recognize their recent fishery dependence/investments, potentially reducing future leasing or acquisition costs, reducing quota to latent permits, and reflecting the more recent market and fishery conditions). The initial allocation is a fair and equitable allocation and is consistent with the requirements of the MSA, the Groundfish FMP, other applicable law, and the court's order in Pacific Dawn.

Comments on widow rockfish QS

Comment 30: One commenter noted that while the draft regulatory language extends the prohibition on transferability of widow rockfish QS, it does not provide for the limited exception that would address outcomes of court actions such as might occur in probate or bankruptcy. The commenter requested that the regulations be clarified to state that any prohibition on the

transferability of widow rockfish QS would also be subject to the current limited exception that allows transferability under a U.S. court order or authorization as approved by NMFS.

Response: NMFS agrees with the commenter that the regulations should be clarified to state that the current exception applies to transfer of widow rockfish QS and has modified the regulatory language, as described below. The existing prohibition on QS transferability allows for transferability under the limited exception raised by the commenter. The extension of the prohibition on transferability of widow rockfish QS should have more explicitly included the extension of the limited exception.

Change from the Proposed Rule

This rule extends the moratorium on transfer of widow rockfish QS in the IFQ fishery indefinitely, pending reconsideration of the allocation of QS for widow rockfish. In response to a public comment, a change has been made for the final rule to clarify that transfer of widow rockfish QS may be allowed under U.S. court order or authorization, and as approved by NMFS. This is consistent with the current transfer exception for QS or IBQ between QS accounts at § 660.140(d)(3)(ii)(B)(2). NMFS will make this change at § 660.140(d)(3)(ii)(B)(2). Additionally, two minor changes were made for clarity in § 660.140 (d)(4)(v) and in § 660.150 (g)(3)(i)(D).

Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS has determined that this final rule is consistent with the Groundfish FMP, the MSA, and other applicable law. To the extent that the regulations in this rule differ from what was deemed by the Council, NMFS invokes its independent authority under 16 U.S.C. 1855(d).

NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule is effective on April 1, 2013. As described in the preamble to the

proposed rule (78 FR 72, January 2, 2013), the initial allocations of whiting to the shorebased IFQ and mothership sectors were challenged in Pacific Dawn. On February 21, 2012, the court in that case issued an order remanding the regulations establishing the initial allocations of whiting for the shorebased IFQ fishery and the at-sea mothership fishery “for further consideration.” The order requires NMFS to implement revised regulations before the 2013 Pacific whiting fishing season begins on April 1, 2013. Waiving the 30-day delay in effectiveness is necessary to comply with the court-ordered deadline. Reconsideration of the initial allocations was a significant undertaking that required development and consideration of different alternatives, review of new information, development of new analyses, and preparation of draft and final environmental assessments and proposed regulations through the Pacific Fishery Management Council, which held three Council meetings and took public comment at all of them. NMFS and the Council devoted substantial effort and resources to accomplish this reconsideration by April 1, including providing a 30-day comment period on the proposed rule to allow time for public comment. Except for the portion of § 660.140(d)(3)(ii)(B)(2) that addresses widow rockfish, the regulatory revisions contained within this rule reinstate certain provisions that were suspended by temporary action (77 FR 45508, August 1, 2012; 78 FR 3848, January 17, 2013) pending reconsideration of the initial allocations and, as specified in the regulatory text, do not actually affect regulated entities until January 1, 2014, at the earliest. Thus, there is more than sufficient time for the public to become aware of and to come into compliance with or take other actions regarding these provisions. Some provisions of this rule (e.g. allowing participants in the program to transfer quota and requiring divestiture of quota in excess of accumulation limits) were components of the original program implemented under Amendment 20 to the FMP (see 75 FR 78344; Dec. 15, 2010) that NMFS delayed until it could

respond to the court order. The public is well aware of these measures and does not need to come into compliance with them within the next 30 days. NMFS previously provided for a 30-day delay in effectiveness of these measures when it issued the rule implementing Amendment 20. In addition, for the portion of § 660.140(d)(3)(ii)(B)(2) that continues the current restriction on transfer of widow rockfish quota shares, the public is aware that this prohibition is in place under the temporary actions cited above and as such, do not require any additional time to prepare to comply with the restriction. For the above reasons, there is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after date of publication.

NMFS prepared an Environmental Assessment (EA) for the reconsideration of initial whiting allocation and concluded that there will be no significant impact on the human environment as a result of this rule. NMFS prepared a finding of no significant impact (FONSI) which can be found in Section 6.2 of the EA. A copy of the EA is available on NMFS' website at <http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Trawl-Program/index.cfm>. Aspects related to this action were previously discussed in the final environmental impact statement (EIS) for Amendment 20 to the Pacific Coast Groundfish FMP which discussed the structure and features of the original trawl rationalization program.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

A Regulatory Impact Review (RIR) was prepared on the action in its entirety and is included as part of the final regulatory flexibility analysis (FRFA) on the regulatory changes. The FRFA and RIR describe the impact this rule will have on small entities. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses

completed to support the action. A copy of the FRFA is available from NMFS (*see ADDRESSES*) and a summary of the FRFA, per the requirements of 5 U.S.C. 604(a), follows: No significant issues were raised by the public comments that were directed to the IRFA itself. However, economic issues were raised in the comments to the Proposed Rule. These mainly concerned the application of the MSA criteria for determining allocations. These issues are addressed in the comments above. Although not directed to the IRFA, there was one comment that touched on the effects on leasing for small companies. This is addressed above in Comment 15.

Reconsideration of Initial Allocation of Whiting

The Council considered four alternatives for allocating whiting. The following analysis compares the No Action Alternative to Alternative 4 as they show greatest differences between the pre-control date fishery and post-control date fishery. The No Action Alternative allocates whiting using the years 1994 to 2003 for harvesters (shoreside and mothership) and 1998-2004 for processors. Alternative 4 allocates whiting using the years 2000-2010 for both harvesters (shoreside and mothership) and processors.

Over the years 1994-2010, there were 65 fishing permit holders that participated in the shoreside fishery and 37 permit holders that participated in the mothership fishery. Over the years 1998 to 2010, there were 17 processors that participated in the fishery and that meet the recent participation criteria of the various alternatives. For quota share purposes there are 17 potential processing plants based on fish ticket information. After taking into account ownership and affiliation relationships, there are 12 processing entities based on SBA definitions. Of these 12 processing entities, there are nine small processing entities and three large processing entities that are affected by this rule. Comparing the No Action Alternative to Alternative 4 in terms of

2011 ex-vessel revenues, information on the gainers and losers in each of these affected groups can be developed from information in the Environmental Assessment (EA). The allocation of 98,000 mt to the 2011 shorebased whiting fishery was worth approximately \$21 million (ex-vessel value). Based on the No Action Alternative allocations, eighty percent of these quota pounds were allocated to fishing permits (\$17 million) and 20 percent to the shorebased processors (\$4 million). The allocation of 57,000 mt whiting to the whiting mothership catcher vessels was worth \$12 million in ex-vessel value. It is important to note that 2011 was a peak year for the shorebased fishery and a near-peak year for the mothership fishery (see Figure 3-5 of the EA). (Note: although ex-processor or “first wholesale” revenues are higher than ex-vessel values and would be a better indicator of processing activity levels, data on ex-processor sales were not readily available for use by the Council. A better indicator of the gains and losses by groups would be changes in profits (revenues less operating costs)).

The Northwest Fisheries Science Center (NWFSC) has developed an estimate of economic net revenue that is an indicator of profits. Economic net revenue seeks to measure economic profit, which includes the opportunity costs of operating a commercial fishing vessel. The NWFSC collected and assessed 2008 cost-earning data on vessels participating in the shoreside groundfish fisheries including whiting. Vessels that participate in the shoreside whiting fishery are typically classified as either “whiting” vessels or “Alaska” vessels depending on whether or not they operated in Alaska. Whiting vessels are defined as those with at least \$100,000 revenue, of which at least 33% comes from whiting. Alaska vessels are defined as those vessels that earned at least \$100,000 in revenue of which at least 50% comes from Alaska fisheries. Based on the responses received, whiting vessels earned 37% of their revenue from West Coast-caught whiting in 2008, Alaska vessels 46%. The average economic net revenue of a

whiting vessel in 2008 was \$167,457, which represents 19.2% of revenue from all fisheries.

Limited entry trawl vessels classified as Alaska vessels had an average economic net revenue of \$493,915, 28.3% of the \$1,744,793 revenue earned from all sources by these vessels. These estimates are based on revenue and cost information directly related to the operation of a commercial fishing vessel such as those associated with office space. Revenues are from West Coast landings, Alaska landings, at-sea deliveries, sale and leasing of permits, chartering for research purposes and other activities related to the operation of the vessel. Compared to other years, these estimates may be high as whiting revenues and overall groundfish revenues were at their highest annual level during the 2001-2010 period during 2008. However, crab revenues during 2008 on the West Coast were at their lowest level since 2003.

Compared with the No Action Alternative, under Alternative 4 approximately 17% (\$3.7 million) of the allocation to shorebased catcher vessels would be transferred away from the No Action Alternative/status quo holders; twenty eight permit holders would gain quota share including six permits that did not qualify under the No Action Alternative (Table 4-4 of the EA). The largest gain by a single permit holder is 3.3% (\$700,000). Alternative 4 would lead to 37 permits losing quota share including 12 permits that would not receive any quota share. The largest loss by a single permit holder would be 2.0% of quota share (\$340,000). A total of 41 out of 65 permits will see a change of less than \$100,000 (increase or decrease) in revenues in comparing Alternative 4 to the No Action Alternative.

In comparing Alternative 4 to the No Action Alternative for shorebased processors, approximately 2.7% (\$567,000) of the shoreside allocation of \$21 million would be transferred away from the No Action/status quo holders; ten processing plants would gain, including seven processing plants that did not qualify under the No Action Alternative (Table 4-29 of the EA).

The largest gain by a single plant is 1.0% of quota share (\$214,000). Alternative 4 would lead to seven processing plants losing quota share including three plants that would not receive any quota share. The largest loss by a single plant is 0.9% of quota share (\$189,000). Twelve out of 17 processing plants would see a change of less than \$100,000. (Note--The Draft EA used processor counts that included one processor that operated four processing plants. Each of these four plants established a QS account and received separate processors' QS allocations under No Action - status quo. For this analysis, especially in regards to estimating impacts on communities, it was decided each of these four processing plants should be treated separately. This treatment changes the number of processors that were active in the fishery at some point during 1994-2010 from 16 to 19 (see, for example, Figure 4-13 in the EA). However, two of those processing plants are no longer in existence and so did not receive processors' QS allocations under No Action - status quo. Consequently in the Final EA's displays that include counts of processors receiving QS allocations under the alternatives, the processor count is reduced from 19 to 17 (see, for example, Table 4-30 in the EA).)

In comparing Alternative 4 to the No Action Alternative for whiting mothership catcher vessels, approximately 18% (\$2 million) of the total catch history assignment would be transferred away from the status quo holders; 16 mothership catcher vessel endorsed permits would gain (Table 4-16 of the EA). No new permits would qualify. The largest gain by a single permit holder would be 4.5% of catch history assignment (\$545,000). Alternative 4 would lead to 21 permits with reduced catch history assignments, including 10 permits that would not receive any catch history assignment. The largest loss by a single catch history assignment holder would be 2.7% (\$333,000). Eighteen out of 36 permits would see a change of less than \$100,000.

In terms of net economic benefit to the nation, the effects of the alternatives are similar. According to the Pacific States Marine Fisheries Council (PSMFC's) Scientific and Statistical Committee:

The way the fisheries are actually prosecuted (geographic location of fishing and landings, timing of fishing, and participants) will, in the long-term, tend not to be affected by who receives the initial allocation of catch shares. Over time, the use of the catch shares will likely migrate through leases or sales to the participants who can put them to their most profitable use. This means that the eventual biological, ecological, and economic performance of the fisheries will be relatively independent of the initial allocation of catch shares. It has been the experience of many catch share programs that such transitions occur rather quickly, often within the first few years. As a consequence, the initial allocation of quota shares is not an effective tool to direct fishing or processing effort to particular geographic locations.

The initial allocation of whiting is a one-time distribution of wealth in the form of quota shares and catch history assignments to members of the fishing industry. The initial allocation is essentially the granting of a capital asset that will affect harvester and processor competitiveness and assist existing participants in the transition to the new management system. To the degree that the initial allocation matches up with the harvesters that will use the quota, transition costs and disruption will be lessened as the fishery moves to its long-term, more efficient state.

Similarly, those processors who receive an initial allocation may experience a boost in their competitive advantage due to the infusion of new wealth (the value of the QS received). The initial allocation does not affect the long-term efficiency and operation of the fishery. However, liquidity constraints, and perhaps other unknown constraints, may mean that there are

some short-term inefficiencies. For example, this one time distribution of wealth may affect expenditures in the communities depending on location and spending patterns of recipients of these quota shares and catch history assignments. The EA provides the following regarding impacts on communities:

The effects of the initial allocations on the distribution of fishing among communities are difficult to predict. Quota is tradable and highly divisible, giving it a fluidity such that it will likely move toward those ports in which profit margins tend to be the highest, regardless of the initial allocations. Where profit margins are similar, allocations given to entities that are already invested in whiting fishery-dependent capital assets are likely to stay with those entities at least in the near term. Similarly, where profit margins are similar, there will likely be some tendency in the near term for quota that is traded to move toward locations where whiting fishery-dependent capital assets already exist. Regardless of how the quota is distributed, vessels may move operations between ports during the year based on the geographic distribution of fishing opportunities. Processors are likely to use their shares in the port in which their facilities are located, however, some processors have facilities in more than one port and so may shift harvest between ports in response to the location of fishing opportunities. At the same time, the recent shift of harvest toward more northern ports appears to be a response to investments in those ports, indicating that the location of fish is not the only factor driving the location of landings. Over the long term, it is expected that operations will move, or quota will be traded, to the ports in which the highest profits can be earned, taking into account all forms of costs such as average distance to fishing grounds and catch and bycatch rates.

While the discussion above concerns the long term efficiency and operation of the fishery, short term distributional effects matter to NMFS and the Council. The initial allocation of quota shares affects each participant's business operation, investments, and community. With the choice of the No Action Alternative over alternatives that reflect more recent history, NMFS and the Council are providing to those who have historically participated in the fishery (the majority of which are also recent participants) a potentially better chance to benefit from the market processes described above.

RAW 1

This action also would revise several regulations that were delayed on an emergency basis in response to the Court order. RAW 1 delayed the ability to transfer QS and IBQ between QS accounts in the shorebased IFQ fishery, and to the ability to sever mothership/catcher vessel endorsement and its associated catch history assignment (CHA) from limited entry trawl permits in the mothership fishery, pending the outcome of the reconsideration.

NMFS postponed the ability to trade quota shares as well as the ability of mothership catcher vessels to trade their endorsements and catch history assignments separately from their limited entry permits. NMFS also postponed all trading of QS species/species groups because for many affected parties, their QS allocations (especially for bycatch species) are a composite of whiting-trip calculations and non-whiting trip calculations. Postponing these activities, while NMFS and the Council reconsidered the whiting allocation, minimized confusion and disruption in the fishery from trading quota shares that have not yet been firmly established by regulation. For example, if QS trading was not delayed, QS permit owners would be transferring QS amounts that potentially could change (increase or decrease) after the reconsideration.

For similar reasons, NMFS also delayed the ability to transfer a mothership catcher vessel (MS/CV) endorsement and associated catch history assignment from one limited entry trawl permit to another in the mothership sector. The ability to sell or trade a limited entry permit with the endorsement and catch history remains. The use of the catch history assignment to be assigned to a co-op to be fished continues. These delays were expected to be temporary in nature and to benefit both small and large entities as they help smooth the transition to any changes in how Pacific whiting is allocated, and reduce the uncertainty to existing and potential new holders of these allocations.

With these revised regulations, those who find themselves with excess QS (except for widow QS) and IBQ, have until November 30, 2015, to divest. MS/CV-endorsed limited entry trawl permit owners will have to divest themselves of ownership in permits in excess of the accumulation limits by August 31, 2016. This rule allows limited entry trawl permit holders in the mothership sector to request a change (or transfer) of MS/CV endorsement and its associated CHA beginning September 1, 2014. Finally, this rule allows transfer of QS or IBQ, except widow rockfish QS, between QS permit holders beginning January 1, 2014.

The Small Business Administration has established size criteria for all major industry sectors in the US, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of

seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts not in excess of \$7.0 million.

NMFS now collects small business information as part of its permit renewal processes. For quota share purposes there are 17 potential processing plants based on fish ticket information. After taking into account ownership and affiliation relationships, there are 12 processing entities based on SBA definitions. Of these 12 processing entities, there are nine small processing entities and three large processing entities that are affected by this rule. Sixteen of the limited entry trawl permits that participated in the shorebased whiting fishery are associated with large companies and 49 of these permits are associated with small companies. In the mothership fishery, 14 catcher vessel permits are associated with large companies and 23 with small companies. When permits associated with the shoreside fishery and the mothership fisheries are combined, there are 66 limited entry permits of which 21 are associated with large companies. Given the review of the various alternatives, the amount of ex-vessel revenues that may change hands, and how each alternative differs slightly in the mixture of large and small entities that qualify for whiting quota share, maintaining the No Action/status quo allocations should not have a significant economic impact on a substantial number of small entities.

No Federal rules have been identified that duplicate, overlap, or conflict with the action.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule,

and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a public notice that also serves as small entity compliance guide was prepared. Copies of this final rule and public notice are available from NMFS Northwest Regional Office, and are posted on its website

(http://www.nwr.noaa.gov/fisheries/management/about_groundfish/index.html), and will be emailed to members of our groundfish fishery email listserve.

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the Pacific Coast groundfish fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the Pacific Coast groundfish fishery is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS issued a Supplemental Biological Opinion on March 11, 2006, concluding that neither the higher observed bycatch of Chinook in the 2005 whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a reconsideration of its

prior “no jeopardy” conclusion. NMFS also reaffirmed its prior determination that implementation of the Groundfish FMP is not likely to jeopardize the continued existence of any of the affected ESUs. Lower Columbia River coho (70 FR 37160, June 28, 2005) and Oregon Coastal coho (73 FR 7816, February 11, 2008) were relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

On December 7, 2012, NMFS completed a biological opinion concluding that the groundfish fishery is not likely to jeopardize non-salmonid marine species including listed eulachon, green sturgeon, humpback whales, Steller sea lions, and leatherback sea turtles. The opinion also concludes that the fishery is not likely to adversely modify critical habitat for green sturgeon and leatherback sea turtles. An analysis included in the same document as the opinion concludes that the fishery is not likely to adversely affect green sea turtles, olive ridley sea turtles, loggerhead sea turtles, sei whales, North Pacific right whales, blue whales, fin whales, sperm whales, Southern Resident killer whales, Guadalupe fur seals, or the critical habitat for Steller sea lions.

As Steller sea lions and humpback whales are also protected under the Marine Mammal Protection Act, incidental take of these species from the groundfish fishery must be addressed under MMPA section 101(a)(5)(E). On February 27, 2012, NMFS published notice that the incidental taking of Steller sea lions in the West Coast groundfish fisheries was addressed in NMFS’ December 29, 2010, Negligible Impact Determination (NID) and this fishery has been added to the list of fisheries authorized to take Steller sea lions (77 FR 11493, Feb. 27, 2012).

NMFS is currently developing MMPA authorization for the incidental take of humpback whales in the fishery.

On November 21, 2012, the U.S. Fish and Wildlife Service (FWS) issued a biological opinion concluding that the groundfish fishery will not jeopardize the continued existence of the short-tailed albatross. The (FWS) also concurred that the fishery is not likely to adversely affect the marbled murrelet, California least tern, southern sea otter, bull trout, nor bull trout critical habitat.

Pursuant to Executive Order 13175, this rule was developed after meaningful consultation and collaboration, through the Council process, with the tribal representative on the Council. The revised regulations have no direct effect on the tribes.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: March 22, 2013

Alan D. Risenhoover,
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq., 16 U.S.C. 773 et seq., and 16 U.S.C. 7001 et seq.

2. In § 660.140, revise paragraphs (d)(3)(ii)(B)(2) and (d)(4)(v) to read as follows:

§ 660.140 Shorebased IFQ Program.

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(d) * * *

(3) * * *

(ii) * * *

(B) * * *

(2) Transfer of QS or IBQ between QS accounts. Beginning January 1, 2014, QS permit owners may transfer QS (except for widow rockfish QS) or IBQ to another QS permit owner, subject to accumulation limits and approval by NMFS. QS or IBQ is transferred as a percent, divisible to one-thousandth of a percent (i.e., greater than or equal to 0.001%). Until January 1, 2014, QS or IBQ cannot be transferred to another QS permit owner, except under U.S. court order or authorization and as approved by NMFS. QS or IBQ may not be transferred between December 1 through December 31 each year. QS or IBQ may not be transferred to a vessel account. The prohibition on transferability of widow rockfish QS is extended indefinitely pending final action on reallocation of widow rockfish QS, except under U.S. court order or authorization and as approved by NMFS.

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(4) * * *

(v) Divestiture. Accumulation limits will be calculated by first calculating the aggregate non-whiting QS limit and then the individual species QS or IBQ control limits. For QS permit owners (including any person who has ownership interest in the owner named on the permit) that are found to exceed the accumulation limits during the initial issuance of QS permits, an adjustment period will be provided during which they will have to completely divest their QS or IBQ in excess of the accumulation limits. QS or IBQ will be issued for amounts in excess of accumulation limits only for owners of limited entry permits as of November 8, 2008, if such ownership has been registered with NMFS by November 30, 2008. The owner of any permit acquired after November 8, 2008, or if acquired earlier, not registered with NMFS by November 30, 2008, will only be eligible to receive an initial allocation for that permit of those QS or IBQ that are within the accumulation limits; any QS or IBQ in excess of the accumulation limits will be redistributed to the remainder of the initial recipients of QS or IBQ in proportion to each recipient's initial allocation of QS or IBQ for each species. Any person that qualifies for an initial allocation of QS or IBQ in excess of the accumulation limits will be allowed to receive that allocation, but must divest themselves of the QS (except for widow rockfish QS) or IBQ in excess of the accumulation limits by November 30, 2015. Holders of QS or IBQ in excess of the control limits may receive and use the QS or IBQ pounds associated with that excess, up to the time their divestiture is completed. Once the divestiture period is completed, any QS or IBQ held by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will be revoked and redistributed to the remainder of the QS or IBQ owners in proportion to the QS or IBQ. On or about January 1, 2016, NMFS will redistribute the revoked QS or IBQ excess percentages to the QS or IBQ owners in proportion to

their QS or IBQ holdings based on ownership records as of January 1, 2016. No compensation will be due for any revoked shares.

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3. In § 660.150,

a. Revise paragraphs (g)(2)(iv)(B), add paragraph (g)(2)(iv)(C), and revise (g)(3)(i)(D) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

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(g) * * *

(2) * * *

(iv) * * *

(B) Application. NMFS will begin accepting applications for a change in MS/CV endorsement registration beginning September 1, 2014. A request for a change in MS/CV endorsement registration must be made between September 1 and December 31 of each year. Any transfer of MS/CV endorsement and its associated CHA to another limited entry trawl permit must be requested using a Change in Registration of a Mothership/Catcher Vessel Endorsement/Catch History Assignment Application form and the permit owner or an authorized representative of the permit owner must certify that the application is true and correct by signing and dating the form. In addition, the form must be notarized, and the permit owner selling the MS/CV endorsement and its CHA must provide the sale price of the MS/CV endorsement and its associated CHA. If any assets in addition to the MS/CV endorsement and its associated CHA are included in the sale price, those assets must be itemized and described.

(C) Effective date. Any change in MS/CV endorsement registration from one limited entry trawl permit to another limited entry trawl permit will be effective on January 1 in the year following the application period.

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(3) * * *

(i) * * *

(D) Divestiture. For MS/CV-endorsed permit owners that are found to exceed the accumulation limits during the initial issuance of MS/CV-endorsed permits, an adjustment period will be provided during which they will have to completely divest of ownership in permits that exceed the accumulation limits. Any person that NMFS determines, as a result of the initial issuance of MS/CV-endorsed permits, to own in excess of 20 percent of the total catch history assignment in the MS Coop Program applying the individual and collective rule described at § 660.150(g)(3)(i)(A) will be allowed to receive such permit(s), but must divest themselves of the excess ownership by August 31, 2016. Owners of such permit(s) may receive and use the MS/CV-endorsed permit(s), up to the time their divestiture is completed. After August 31, 2016, any MS/CV-endorsed permits owned by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will not be issued (renewed) until the permit owner complies with the accumulation limits.